No. 5718

United States Circuit Court of Appeals

For the Ninth Circuit.

JOHN W. FELDER, MAURICE A. GALE, GEORGE SCHMIDT AND ROBERT GIERKE, Copartners, Doing Business as FELDER, GALE AND COMPANY,

Appellants,

vs.

H. W. REETH,

Appellee.

BRIEF ON BEHALF OF APPELLEE.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE TERRITORY OF ALASKA, FOURTH DIVISION.

LOUIS K. PRATT,
Attorney for Appellee.

INDEX.

TABLE OF CASES CITED.

No. 5718.

United States

Circuit Court of Appeals

For the Ninth Circuit.

JOHN W. FELDER, MAURICE A. GALE, GEORGE SCHMIDT and ROBERT GIERKE, Copartners, Doing Business as FELDER, GALE AND COMPANY,

Appellants,

vs.

H. W. REETH,

Appellee.

BRIEF ON BEHALF OF APPELLEE.

STATEMENT OF THE CASE.

This action was commenced at Flat in the Fourth Judicial Division where the issues were partially made up and completed later at Fairbanks. The trial took place at Bethel in the absence of the attorneys for either party, and afterwards it was argued at Fairbanks where Findings of Fact and Conclusions of Law were signed August 29, 1928, and Judgment on the Findings entered of record October 10, 1928. The case was tried upon the Com-

plaint (Record, p. 1), Second Amended Answer and Counterclaim (Record, p. 56) and Reply (Record, p. 65).

The contention of Appellants at all stages was that the matter contained in Appellee's Second Amended Answer and Counterclaim (Record, pp. 56–61), sounded in tort and notwithstanding Appellee's waiver of the tort and his election to rely upon implied contract, could not be used as a counterclaim under Sec. 896 of the Compiled Laws of Alaska.

ARGUMENT.

I.

Where an Answer and Counterclaim has Been Stricken Out Either on Motion or Demurrer, It is No Longer a Part of the Record in the Case and cannot be Used to Test the Correctness of the Court's Ruling on a Demurrer to a Second Amended Answer and Counterclaim.

Appellants demurrer to Appellee's Answer and Counterclaim (Record, p. 55), was sustained (Record, p. 56), and his Amended Answer and Counterclaim, was successfully attacked by motion, and on August 20, 1924, he filed his Second Amended Answer and Counterclaim (Record, p. 56), against which Appellants moved to strike and demurred unsuccessfully (Record, pp. 62–64). Appellants replied thereto and the issues were closed. (Record, p. 65).

Appellee's original Answer and Counterclaim (Record, p. 48), having been put out of the case

by Appellants' Demurrer, was and is no longer a part of the record and should not have appeared therein, and cannot be used by a reviewing court to in any manner influence its decision upon the question of the propriety of the trial court's ruling on the Demurrer to the Second Amended Answer and Counterclaim (Record, pp. 64, 65). Appellants' principal Assignment of Error is based upon this last-mentioned ruling. The Supreme Court of Oklahoma in Owens vs. State, 271 Pac. 938, 943, Col. 2, discusses this question of practice and say:

> "Counsel for plaintiff devote a considerable space in their brief to the nature of the original and first amended cross-petition of the defendant. In fact, Counsel's contention that the cross-petition was an action in tort seems to be based wholly upon these discarded pleadings. It is settled law that, where an amended pleading is filed as a substitute for the other pleading or filed without especially adopting the original pleading, the allegations of the prior pleading, except as repeated in the amended pleading, are wholly abandoned and no reference whatever can be made to the original pleading in determining whether or not a demurrer should be sustained to the pleading in its amended form."

The Oregon Supreme Court has held the same in Wells vs. Applegate (Ore.), 6 Pac. 770, 771:

> "The pleadings on which the parties went to trial became the sole pleadings in the case, as

if no others ever existed. By filing the new answer the former answer was in effect withdrawn, and all motions and demurrers relating to it accompanied it."

II.

Where Personal Property is Wrongfully Taken and Converted, the Injured Party may Waive the Tort and Rely on an Implied Contract, Raised by the Law Itself, and can Use It Either as a Cause of Action in a Complaint or as a Defense by Way of Counterclaim; and, When so Used, the Measure of Damages is Determined upon the Same Legal Principles as in the Instance of any Other Breach of Contract.

Appellants seek to reverse the Judgment of the lower court for what they claim was its erroneous view of the scope and purpose of our law on the subject of counterclaims, found in the Alaska Code of Civil Procedure, Section 896, which reads:

> "The counterclaim mentioned in the last preceding section must be one existing in favor of the defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the following causes of action:
>
> First. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim. Second. In an action arising on contract, any other cause of action arising also on contract,

and existing at the commencement of the action.

The defendant may set forth by answer as many defenses and counterclaims as he may have. They shall each be separately stated and refer to the causes of action, which they are intended to answer in such manner that they may be intelligibly distinguished."

This section of our code is a combination of common law counterclaim and set-off, the first subdivision covering counterclaim and the second set-off. Appellee's Second Amended Answer and Counterclaim (Record, p. 56), was framed to meet the requirements of the second subdivision, that is, set-off, by waiving the tort involved in the taking of his hydraulic plant and founding his right to counterclaim upon the theory of implied contract. However, the reply disclosed to Appellee and his attorney a state of facts that would bring his counterclaim within the first subdivision and constitute it "a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiffs' claim." This latter phase will be discussed in a subsequent part of this brief.

III.

There was no Bill of Exceptions made and necessarily this Court will have to rely upon the Complaint, Second Amended Answer and Counterclaim, Reply, Findings of Fact and Conclusions of Law, and Judgment. The first Finding of Fact (Record, p. 75), finds generally,

> "that the allegations contained in the first four paragraphs of the defendant's Second Amended Answer and Counterclaim were true"

and the Second Finding (Record, p. 78), specifically finds that:

> "he was entitled to counterclaim the value of the machinery taken from him"

which taken together amount to a finding that Appellee had in fact elected to waive the tort involved in the taking of his property and rely upon the implied contract raised by the law that Appellants would pay him therefor. Upon the question of the significance of general findings, I desire to quote from the case of Magurin vs. Stefanich et ux. (Calif.), 272 Pac. 774, col. 1:

> "While there is no specific finding covering this allegation, there is a blanket finding, 8, 'that all the allegations contained in the Answer of the defendants are true.' This is a sufficient finding that the relation of attorney and client existed at the time of the negotiations alleged in the answer."

The Trial Court epitomized the issues in the case and the evidence in support in its second Finding of Fact (Record, p. 76), which reads:

> "That prior to August, 1921, the defendant became the owner by location and purchase of contiguous placer mining claims of an area of about 1200 acres, located at Golden Gate Falls, on the Riglugalic River, a tributary of the Kuskokwin river, in the said Division and Territory,

and up to that time had prepared the same for hydraulic mining by the construction of cabins, machine shop and other buildings, digging ditches, placing a dam across the said river and clearing the ground of brush and was ready to commence open cut hydraulic mining thereon. That in 1919 the defendant purchased in San Francisco, California, a hydraulic mining plant, consisting of (describing the different articles), and in the summer of 1920 caused the same to be shipped from San Francisco, California, to Bethel, Alaska, and from there it was started for his mining ground at Golden Gate Falls on said Riglugalic River, but owing to high water the boat transporting the same was unable, by reason of the swift current, to get farther than a point called 'Supply Camp' on the said river, which is about forty miles down river from the said Golden Gate Falls, and at that point the said machinery was taken from the boat and put on the bank and placed under a tent and in charge of a native Indian. That in August, 1921, the plaintiffs employed one Tony Sumi to proceed with a power boat from Bethel to the said Supply Camp on the Riglugalic River and load the said machinery thereon and return it to Bethel, which the said Tony Sumi did and delivered the same to these plaintiffs who afterwards sold the same and kept the proceeds. That the action of the plaintiffs in taking the said machinery and disposing of it was without the knowledge or

consent of the defendant, was unlawful, unjustifiable and oppressive and resulted in compelling the defendant to abandon his mining enterprise at Golden Gate Falls. That under the circumstances and conditions as they existed at that time and by reason of the fact that there was no market value for said machinery at that time and place, and by reason of the use that the defendant could have put it to, the said machinery was worth to him the sum of $8000.00 and he is entitled to counterclaim that amount with interest thereon at eight per cent per annum from September 1, 1921, aggregating $12,480.00, as against the debt owing by him to the plaintiffs."

In the absence of a Bill of Exceptions preserving the evidence, this Court is bound to assume that the testimony heard by the court warranted it in making this Finding of Fact, and the only thing that remains is to apply the law arising thereon upon the two questions of waiving a tort and depending on implied contract and the principles of law upon which the value of property should be estimated.

IV.

It is settled law that where one's personal property is wrongfully taken from him and converted by another, he may waive the tort involved in the transaction and sue for and recover the value of the property as upon an implied contract. The Oregon Supreme Court passed upon this question in

the early case of Miller vs. Hirschberg, 40 Pac. 506, using this language at page 510, col. 1,

> "Under some circumstances a plaintiff may waive a tort and sue in contract, but he is not compelled to do so. The defendant, having received, and wrongfully converted to his own use, property in which Bentley had both a right of property and right of possession, cannot insist that he shall waive the tort and sue in assumpsit for its value. He was entitled to adopt the form of action he preferred and having elected to proceed in tort is entitled, after judgment, to have the findings of court construed to support the judgment, if it can be done without violating well-settled rules of law."

That Court again expressed itself upon this subject in the case of Casner vs. Hoskins (Ore.), 128 Pac., paragraph 12 of the syllabus on page 841 reads:

> "Where plaintiff wrongfully took possession of a railroad constructed by defendant, defendant might waive the tort and upon sale by plaintiff treat him as his agent and recover in *assumpsit* the purchase price, or, under the broader American rule, waive the tort and bring an action for the value of the road, and hence may, under L. O. L., Sec. 74, Subdivisions 2, 3, providing that in an action on contract any other cause of action on contract may be pleaded as a counterclaim, plead the taking

of the road as a counterclaim in an action on a promissory note."

In the opinion at page 847, col. 2, this commentary is made:

> "The principle thus announced is known as the English doctrine which probably prevails in the greater part of the United States. A more liberal rule, however, has been adopted in many of the states where, the conversion having been waived, the wrongdoer can be sued as for property sold and delivered, whether or not he has disposed of it, and the value of which may be recovered in an action instituted for that purpose. 7 Ency. Pl. & Pr. 369. The legal principle last asserted is not founded upon the precept of ratification, and if property has been sold by the tort-feasor for less than its value, unless the owner with full knowledge of the facts relating to the entire transaction accepts the proceeds or a part thereof, he does not, by waiving the tort and bringing an action for the value of the goods, confirm the act, and is not bound by the conduct of the wrongdoer, except so far as mere conversion is concerned."

The Oklahoma Supreme Court considered this question exhaustively in the case of Owens vs. State ex rel. Mothersead, 271 Pac. 938. That court utterly repudiates the English rule followed in a number of states that the recovery should be limited to the amount received by the wrongdoer upon a

resale, and upholds the doctrine of the Oregon court, that the rule of damages would be the market price, if there was any; in a word that the rule would be the same as in any other case of damages for breach of contract. The court expressed itself upon this phase at page 942, col. 2, in this language:

> "It appears to us to be elementary that a suit for compensation, based on a transaction involving what is in law a sale, and that operates to transfer a title to property, where it is not sought to have the specific property returned to its owner, the measure of damage is the value of the property so taken and appropriated. Any other rule would be inconsistent with the fundamental law of damages, as the same relates to the law of contracts. The rule is stated in 17 Corpus Juris, 852, par. 168, as follows: 'Where a tort is waived and an action is brought in contract, the measure of damage is governed by the rule applicable to actions in contract.' Plaintiff contends that, in case of a waiver of the tort, the measure of damage is not the value of the property taken, but it is the benefit resulting or accruing to the wrongdoers estate. With this, in its unqualified or unrestricted sense, we cannot agree. However, when not attempting to state a fixed or exclusive rule, it may be said in a general way that the law will, at the election of the party injured, imply or presume a contract on the part of the wrongdoer to pay to the injured party the full value

of the benefits resulting to such wrongdoer. Farmers' & Merchants' National Bank of Hobart vs. Huckaby, *supra.* This rule is not necessarily objectionable, when applied to a great number, or perhaps a majority, of the cases, when it does not attempt to set forth a rule of independent application to measure the damage in an action based upon an implied contract. The rule is not primary or independent and must bear the qualification that, in determining the value resulting to the estate, the value of the property wrongfully taken is the 'yardstick,' and when the one, the value of the property, is determined, the other, the benefit to the estate, logically follows. For all practical purposes it may be said that the rules are reciprocal; that is, there is a conclusive legal presumption that the value resulting to the estate of the wrongdoer is equal to and equivalent to the actual value of the property taken by the wrongdoer."

These excerpts fully meet the argument and authorities in Appellants' brief that the measure of Appellee's damage should have been confined to the amount actually realized by Appellants when they sold Appellee's hydraulic plant. While it is true the English doctrine referred to and applied in many of the different states, would confine the injured party to a recovery of the amount which the wrongdoer received for the converted property, yet that obviously unjust rule has been condemned

by the Oregon and Oklahoma Supreme Courts and many others.

There is, however, nothing in this record from which this court may know how much Appellants received from the sale of Appellee's hydraulic plant. It is stated in the Reply that Appellants got $550.00 for part of it and that is repeated in the brief, but the evidence is not before this court by Bill of Exceptions and the Findings of Fact and Conclusions of Law make no reference to that matter. So, as the case stands, this court in order to uphold the Findings of Fact and Conclusions of Law and Judgment, will be inclined to assume and presume that they got a sum for the entire plant equal to or greater than the amount fixed by the court as its value, to wit; $8,000.00.

The attorneys for Appellants in their brief contend that it is impossible for Appellee, upon the allegations of fact contained in his Second Amended Answer and Counterclaim, by any known system of ratiocination, to waive the tort involved in the taking of his hydraulic plant and found his counterclaim upon implied contract. They reach this conclusion because there is language used in the Second Amended Answer and Counterclaim and also in the Findings, appropriate as a basis for damages for tort, but this overlooks the fact that there is other language therein, which emphasizes the attitude assumed by Appellee and makes it manifest that he intended to, and has, in fact, waived the tortious taking of his property and chose to rely on the breach of an implied contract. The trial court so

construed the Second Amended Answer and Counterclaim and applied the evidence thereto accordingly.

The language in Appellee's pleading applicable in an action for damages for tort could be and, no doubt, was, either ignored as surplusage by the Court, or considered along with other matters as bearing upon the proper test to be applied in fixing a value on the property wrongfully converted; that is, it might properly influence the Court, in a sense, in adopting the test that it did, to wit; the value of the hydraulic plant to Appellee at the time and place of conversion.

V.

Where Personal Property is Wrongfully Converted and the Owner Elects to Waive the Tort and Sue for Its Value, and the Property has No Market Value at the Time and Place of the Taking, the Proper Test is the Worth to the Owner Under All the Circumstances Existing at the Time and Place of Conversion.

The Court in the second Finding of Fact (Record, p. 76), found that Appellee owned about 1,200 acres of placer mining ground at Golden Gate Falls on the Riglugalic River, which he had prepared for hydraulic mining and to that end had ordered a hydraulic plant and shipped it from San Francisco, California, to Bethel; that it arrived at Bethel in the summer of 1920 and was started up the Kuskokwin and Riglugalic Rivers for his ground at

Golden Gate Falls, but owing to high water in the Riglugalic River, it had to be unloaded at a point which he called "Supply Camp," where it was placed under a tent in the charge of an Indian; that in August, 1921, Appellants wrongfully took said hydraulic plant from Supply Camp and removed it to Bethel, and afterwards sold it and kept the proceeds; that this resulted in compelling Appellee to abandon his mining enterprise at Golden Gate Falls; that at the time and place of the taking, there was no market value for the said property. On this state of facts the Trial Court fixed the value of the machinery at what it was worth to Appellee under the circumstances and conditions as they then existed and in that was clearly justified both in law and morals.

This question received attention by the Supreme Court of Oregon in the case of Swank vs. Elwart (Ore.), 105 Pac. 901. Paragraph 11 of the syllabus on page 902 states the rule as to the measure of damages, where there is no market value, as follows:

> "As a general rule, the measure of damages for conversion is the market value of the property at the time and place of the conversion, if it has such value, but if it has no market value at the time and place of conversion, and it is more particularly valuable to the owner than anyone else, then it may be estimated with reference to its value to him; but, before resort may be had to such method of establishing value, it must be affirmatively shown that there is no market value."

In the opinion at page 906, col. 2, this language appears:

> "But if the property has no market value at the time and place of conversion, either because of its limited production, or because it is of such a nature that there can be no general demand for it, and it is more particularly valuable to the owner than anyone else, then it may be estimated with reference to its value to him. Before resort may be had to such method of establishing value, it must be affirmatively shown that there is no market value." 4 Sutherland on Damages, Sec. 1117.

VI.

By Their Reply Appellants have Estopped Themselves from Raising Any Question as to the Validity of Appellee's Counterclaim.

In paragraphs 1 to 7, inclusive, of the Reply (Record, pp. 67–71), Appellants make the following statements in substance:

> "That in 1919 they were merchants at Bethel and Appellee was engaged in mining at Golden Gate Falls on the Riglugalic River; that he applied to them for credit in the way of provisions, mining supplies, and the taking up of checks that he might issue to workmen and others in connection with his mining operations and represented to them that he had valuable mining ground at Golden Gate Falls which he was desirous of working and that he was about to send outside and have shipped in a

good and sufficient hydraulic plant and equipment to enable him successfully operate the ground and that he had available funds in the Scandinavian-American Bank at Seattle, Washington, and that appellants would run no risk in extending him credit as his property was ample security to them; that believing such representations to be true, appellants advanced the credit asked for by Appellee; that in 1920 the hydraulic plant mentioned by Appellee was shipped to him from San Francisco, California, and arrived at Bethel and when it got there Appellants *consented* that Appellee might move it up the Kuskokwin and Riglugalic rivers to his mining ground at Golden Gate Falls and that Appellee started to move the machinery but cached it on the bank of the Riglugalic river at a point that he called 'Supply Camp'; that in the fall of 1921 Appellants were informed that the said machinery was about to be washed into the Riglugalic river and lost and considering that that was all the security they had for their advances, sent a power boat up from Bethel and had the hydraulic plant removed to Bethel, at which time they notified Appellee of what they had done and informed him that if he would pay them the amount he owed and also the expense of removing the plant from Supply Camp to Bethel, he could have the machinery; that afterwards Appellants sold a part of the plant for $550.00 to Al Walsh; that the balance of the plant had been

attached by the U. S. Marshal under a writ issued in their action."

From this it appears that Appellee offered his mining ground and hydraulic plant as security for the advancements he wished Appellants to make and that they, relying thereon, delivered merchandise, cashed his checks and *consented* and *permitted* him to move the plant from Bethel to Supply Camp and that they believing they had some kind of an equitable lien on the hydraulic plant for their advances, took it into their possession without the knowledge or consent of Appellee and afterwards disposed of it, or at least a part of it. This involves the hydraulic plant, its purchase and transportation to Supply Camp and the conversion thereof by Appellants, with the original contract and transaction whereby Appellants advanced credit to Appellee and which is made the subject matter of the twenty-eight causes of action in the complaint.

Appellants would seem to think from what is said in the Reply that Appellee made a mistake in founding his counterclaim upon the theory of set-off and should have based it upon the first subdivision of Section 896; that is to say, his counterclaim ought to have been asserted as constituting "a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim."

This should estop Appellants from raising any question touching the validity of Appellee's counterclaim.

VII.

Conclusion.

The disquisitions in Appellants' brief on the subject of counterclaims under Section 896, Compiled Laws of Alaska, and the correct rule by which to fix the value of personal property wrongfully converted, where the injured party waives the tort and chooses to rest his right upon implied contract, are so fine and volatile that, if shot through the bill of a humming-bird into the eye of a gnat, wouldn't make the gnat wink. If Justice has caught up with Appellants in this instance, they have no one to blame but themselves. Their conduct was high-handed and exhibited scant respect for the property rights of Appellee. The Findings and Judgment of the Trial Court were amply justified by the pleadings and evidence.

Respectfully submitted,

LOUIS K. PRATT,

Attorney for Appellee.

Copy of the foregoing Brief on Behalf of Appellee received this 18 day of May, 1929.

ALBRECHT AND TAYLOR,

Attorneys for Appellants.